

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-742

COMMONWEALTH

vs.

AUGUSTO V. CARVALHO.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

A jury convicted the defendant of operating a motor vehicle under the influence of liquor (OUI-liquor), G. L. c. 90, § 24 (1) (a) (1), and negligent operation, G. L. c. 90, § 24 (2) (a). On appeal, the defendant contends that the evidence did not support either conviction. We affirm.

Discussion. We review the defendant's contention to determine whether "there was enough evidence that could have satisfied a rational trier of fact of each . . . element beyond a reasonable doubt." Commonwealth v. Latimore, 378 Mass. 671, 677-678 (1979). In doing so, we view the evidence "in its light most favorable to the Commonwealth, notwithstanding the contrary evidence presented by the defendant." Id. at 676-677, quoting Commonwealth v. Sandler, 368 Mass. 729, 740 (1975).

1. OUI-liquor. The essential elements of OUI-liquor are "(1) operation of a vehicle, (2) on a public way, (3) while under the influence of alcohol." Commonwealth v. O'Connor, 420 Mass. 630, 631 (1995), citing G. L. c. 90, § 24.

The defendant asserts that the evidence did not support a finding that he was under the influence. We disagree. "[T]he phrase 'under the influence' refers to impairment, to any degree, of an individual's ability to safely" operate a vehicle. Commonwealth v. Veronneau, 90 Mass. App. Ct. 477, 479 (2016). Here, the defendant was observed swerving in and out of his lane for a period of about ten to fifteen minutes. See Commonwealth v. AdonSoto, 475 Mass. 497, 510 (2016) (swerving and weaving evidence of impairment).

There were also several typical indicia of intoxication. The officer observed that the defendant's speech was slurred, an odor of alcohol coming from him, and that he presented with glassy eyes. See AdonSoto, 475 Mass. at 510. The defendant also gave inconsistent answers in response to questions about how much alcohol he had consumed that evening -- first stating that he had one glass of wine and then changing that to four glasses of Portuguese wine. Finally, the defendant performed poorly on the roadside tests that the officer administered. The defendant, who admitted to having attended the University of

Rhode Island for three years, was unable to recite the alphabet or count backwards.

Contrary to the defendant's position, the assessment of the weight and credibility of the defendant's evidence that his erratic driving was attributable to poor road conditions and confusing instructions from his GPS device, and that his poor performance on the roadside tests was attributable to a language barrier, "was properly left to the jury." Id. The defendant's evidence on these points did not cause the Commonwealth's case to deteriorate. Deterioration occurs when "evidence for the Commonwealth necessary to warrant submission of the case to the jury is later shown to be incredible or conclusively incorrect." Kater v. Commonwealth, 421 Mass. 17, 20 (1995). Mere contradiction, which is all the defendant's evidence amounted to here, does not deteriorate the Commonwealth's case. Id.

2. Negligent operation. "To obtain a conviction for negligent operation of a motor vehicle pursuant to G. L. c. 90, § 24 (2) (a), the Commonwealth must prove that the defendant (1) operated a motor vehicle (2) upon a public way (3) negligently so that the lives or safety of the public might be endangered." Commonwealth v. Ross, 92 Mass. App. Ct. 377, 379 (2017). The defendant argues that the Commonwealth failed to prove negligence. We disagree.

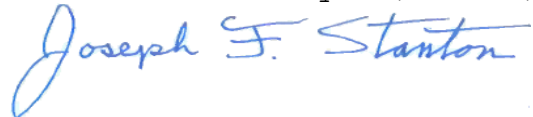
The jury heard that at least ten to fifteen minutes of the defendant's highway driving consisted of his swerving outside his lane and nearly colliding with the guardrails and construction barriers. See Commonwealth v. Daley, 66 Mass. App. Ct. 254, 256 (2006) (swerving and nearly striking sign evidence of negligent operation). As discussed earlier, the jury could have also reasonably concluded that the defendant operated the vehicle in such a manner while intoxicated. See Ross, 92 Mass. App. Ct. at 380, and cases collected. The Commonwealth is not required to prove that the defendant's driving actually endangered a member of the public; it is sufficient when the evidence establishes, as it did here, that the defendant's driving might have endangered a member of the public. Daley, supra.

We likewise fail to see that the Commonwealth's case against the defendant on the negligent operation charge deteriorated. At no time did the defendant show the Commonwealth's evidence to be "incredible or conclusively

incorrect." Kater, 421 Mass. at 20.

Judgments affirmed.

By the Court (Vuono,  
Maldonado & Neyman, JJ.<sup>1</sup>),

A handwritten signature in blue ink that reads "Joseph F. Stanton". The signature is written in a cursive style with a large initial "J" and a long horizontal stroke at the end.

Clerk

Entered: July 23, 2019.

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<sup>1</sup> The panelists are listed in order of seniority.